Table of Contents.

Opinion below	1
Questions presented for review	1
Statutes involved	2
Statement of the case	2
Argument	6
I. There are no special or important reasons for granting a review on writ of certiorari on this petition	7
II. The decisions of the Courts below are not in conflict with any decision of this Court nor in conflict with any decision of any other Court of Appeals	9
A. The Courts below, notwithstanding plaintiff's unsupported assertions in the petition to the contrary, did consider the evidence as a whole, allowing the plaintiff the benefit of all inferences to which it was entitled under the decisions of this Court, but there was no evidence in the record, direct or circumstantial, from which a jury could find any conspiracy in violation of the anti-trust laws	9
B. There is no conflict between Circuits	16
C. The evidentiary rulings of the trial judge were clearly correct and should not be reviewed by this Court	17
Conclusion	19

Table of Authorities Cited.

CASES.

Beacon Theatres Inc. v. Westover, 359 U.S. 500 16

Brown v. Western Massachusetts Theatres, Inc., 288 F. 2d 302 10

Chateaugay Ore & Iron Co. v. Blake, 144 U.S. 476 18

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 16

General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175 9

Gold Fuel Service, Inc., v. Esso, 306 F. 2d 61, cert. den. 371 U.S. 951 11

J.J. Theatres, Inc., v. Twentieth Century-Fox Film Corp., 212 F. 2d 840 16, 17

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 9

Malta Manufacturing Co. v. Osten, 215 F. Supp. 114 15

Momand v. Universal Film Exchanges, Inc., 172 F. 2d 37, cert. den. 336 U.S. 967 15

Naumkeag Theatres Co., Inc., v. New England Theatres, Inc., 345 F. 2d 910 1, 4, 5, 7, 10, 11, 12, 16, 17n., 18

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 16

Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508 8

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 15

Theatre Enterprises, Inc., v. Paramount Film Distributing Corp., 346 U.S. 537 8, 10

United States v. Johnson, 285 F. 2d 35 18

United States v. Johnston, 268 U.S. 220 8

United States v. Paramount Pictures, Inc., 334 U.S. 131, 66 F. Supp. 323 8

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 18

Viking Theatre Corp. v. Paramount Film Distributing Corp., 320 F. 2d 285 7n.

Viking Theatre Corp. v. Paramount Film Distributing Corp., 378 U.S. 123 7n.

Winchester Theatre Co. v. Paramount Film Distributing Corp., 324 F. 2d 652 11

Winthrop Products Corp. v. Elroth Co., Inc., 331 Mass. 83 18

STATUTES, ETC.

Clayton Act, 15 U.S.C. § 15 2

Sherman Act, 15 U.S.C. §§ 1, 2 2

Rules of the United States Supreme Court, Rule 23 6n.

Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 474.

NAUMKEAG THEATRES CO., INC.,
Petitioner,

v.

NEW ENGLAND THEATRES, INC., ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Opinion Below.

The opinion of the Court of Appeals for the First Circuit (Pet. App. A) is reported at 345 F. 2d 910 (1965).

Questions Presented for Review.

The substance of the plaintiff's six "Questions Presented" (Pet. 2-4) can be summarized as actually presenting for review by this Court only the following:

1. Whether the Court of Appeals was not fully warranted in affirming the judgment of the District Court in a private anti-trust action in which the District Court directed a verdict for the defendants where at the trial the plaintiff adduced no evidence, direct or circumstantial, from which a jury could find any conspiracy in violation of the anti-trust laws, but, on the contrary, the evidence clearly showed that the action of the defendants was commercially justified for independent business reasons common to each of them.

2. Whether certain evidentiary rulings by the trial judge were error or the exercise of permissible discretion where such rulings involved the exclusion of (*i*) evidence offered by the plaintiff relating to a non-defendant theatre not shown to be fairly comparable to the theatres of the defendant exhibitors, (*ii*) opinions of so-called "expert" witnesses who were not qualified and whose proffered testimony on the subject of damages was based on nothing more than speculation or guesswork contrary to the evidence, and (*iii*) certain letters which were written six years prior to the period for which plaintiff seeks damages and were of a self-serving character.

Statutes Involved.

The pertinent provisions of Sections 1 and 2 of the Sherman Act (15 U.S.C. Sections 1 and 2) and of Section 4 of the Clayton Act (15 U.S.C. Section 15) are set forth in the petition at pages 75-77.

Statement of the Case.

This is a private motion-picture anti-trust action in which the plaintiff (the petitioner here), being dissatisfied

with its relative playing position in the Lynn-Salem, Massachusetts, competitive area—which generally resulted in its playing twenty-eight days after first-run Boston—charges (PR 1-29*) the defendants with conspiring against it in denying it the playing position, or "run," which it desired—which would have permitted it to play twenty-one days after Boston (PR 1434). The period for which the plaintiff seeks damages is March, 1955, to July, 1962 (PR ii, iv). A verdict was directed for all defendants by the Trial Court, and judgment was entered thereon (PR 1571-1572; 36). The judgment of the Trial Court was affirmed by the Court of Appeals (Pet. App. B).

Throughout the period in question the plaintiff operated the Paramount Theatre in Salem, Massachusetts (PR 1181). Defendants are six distributors† of motion-picture films and two exhibitors‡ of motion pictures in the City of Lynn, Massachusetts. Admittedly, there was no ownership interest or affiliation between any of the defendants (345 F. 2d at 911).

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*In this brief, references (*i*) to the petition will sometimes be indicated by the prefix "Pet.," (*ii*) to the Record Appendix to the Appeal Brief for Appellant (vols. 1-5) by the prefix "PR," (*iii*) to volume 6, the Exhibit Volume, of the Record Appendix to the Appeal Brief for Appellant by the prefix "V6," and (*iv*) to the Record Appendix to the Appeal Brief for Appellees by the prefix "DR."

†Metro-Goldwyn-Mayer, Inc., formerly Loew's, Incorporated ("M.G.M.") (PR 224), Paramount Film Distributing Corporation ("Paramount Film"), Twentieth Century-Fox Film Corporation ("Fox"), United Artists Corporation ("United"), Universal Film Exchanges, Inc. ("Universal"), and Warner Bros. Pictures Distributing Corporation ("Warner Bros.").

‡New England Theatres, Inc. ("New England"), which operated the Paramount Theatre in Lynn (PR 1136, 1137), and Massachusetts Amusement Corporation and Stanley Warner Management Corporation, two affiliated companies (collectively hereinafter sometimes referred to as "Stanley Warner"), the first of which operated the Warner Theatre in Lynn, to which the second supplied managerial services (PR 587).

Usually, and during most of the period, each defendant distributor gave its first-run and a twenty-one-day clearance to the downtown Boston theatres (PR 70, 229-230, 348-349, 578-579, 812, 874, 1109). The theatres in Lynn and in a number of other cities close to Boston were thereafter in most cases entitled to the first suburban run (PR 71-73, 235-236, 349-350, 579-580, 836-838, 875-876), followed immediately by the plaintiff (PR 1444-1447). Except for its competitor in Salem—with which plaintiff had made a "private arrangement" to split product (PR 1228-1230) without the consent of any, and over the expressed protests of some, distributors (PR 258, 652-653, 1438)—all theatres in plaintiff's competitive area (except in Lynn and Boston) were for most of the period subject not only to an availability behind the plaintiff, but to a seven-day clearance in plaintiff's favor (PR 324-325, 1426, 1491, 1494), which favored treatment plaintiff actively sought (PR 1426, 1427, 1494).

All of the witnesses questioned on the subject, including the plaintiff's manager (as the Court below concluded on consideration of his own statements—345 F. 2d at 912-913), testified to the existence of substantial competition between the theatres in Lynn and Salem (PR 116, 251-256, 408, 631, 887, 1166, 1415-1434).

The branch manager of each distributor testified without contradiction that it was to the financial advantage of his company not to play its pictures in Lynn and Salem at the same time, because, by having successive runs or "play-offs" in the Lynn-Salem area, the period during which the pictures would be available to the public in the area would be extended and more people would be able to see them, thus resulting in more film rental to the distributor (PR 141-142, 304, 466, 716-717, 849, 860, 887, 1075). Lynn was a much larger city than Salem (PR 254; 1307-1308), and

each branch manager said that, in his opinion, Lynn, as the larger situation, would accordingly produce the most film rental for his company (PR 118, 255, 384, 631, 849, 887). Given these facts, it was the business judgment of each of them to play Lynn, the larger situation ahead of Salem, the smaller, notwithstanding the conceded fact that the Paramount Theatre in Salem was in size and appointments on a par with the defendants' theatres (345 F. 2d at 911). And, as the Court of Appeals found, "it in no way appears how any distributor could have improved its profits simply by putting plaintiff on the same run as defendant theatre" (345 F. 2d at 913).

In 1958 the plaintiff requested "that film be made available for the Paramount Theatre in Salem, 21 days after Boston showing" (footnote 8, 345 F. 2d at 915). In response to this request, the distributors, Paramount Film and Fox permitted the plaintiff to bid against Lynn for product (PR 107, 392), but the plaintiff was generally unsuccessful for the reason, as admitted by its own manager, that "we just didn't . . . stretch for them and bid a substantial amount of money." The plaintiff's manager conceded that it "didn't bid high enough" (PR 1223). As to the defendants M.G.M. and Warner Bros., plaintiff, pursuant to its "private arrangement" (or "split of product") with its Salem competitor, refused to play any M.G.M. or Warner Bros. pictures (PR 1498-1499). Those two distributors, therefore, did not consider the question whether bidding should be instituted between Salem and Lynn (PR 266-267, 650), and each of them refused to change Salem's availability to that of Lynn (V6 31, 69). The distributors United and Universal (who were not important to plaintiff*) did not understand the plaintiff to request bidding,

*Field, the plaintiff's manager, indicated that the plaintiff favored the product of the defendants Fox and Paramount and the non-defendant Columbia (PR 1333).

and also declined to change its availability to that of Lynn (V6 72-73; PR 974).

The important non-defendant distributor Columbia permitted the plaintiff to play on the Lynn availability for most of the period in question (PR 1092), for the reason that its customer in Lynn, the non-defendant Capitol Theatre (PR 1093-1094), was greatly inferior to all the theatres involved in this litigation (PR 1119, 1162, 1171).

The exhibitor defendants, New England and Stanley Warner, were not shown to have taken any action to secure, or to hold onto, the challenged priority of run in their favor. The plaintiff made no protest to either of them (PR 1436-1437); but the evidence showed that Stanley Warner's protest as to its playing position after Boston was denied (PR 156-157, 741, V6 8, 10); and that both Lynn exhibitors protested without avail against the institution late in the period by the distributor Universal of its so-called "new releasing plan" (PR 1051-1056; Ex E). So far as the record shows, the defendant Lynn exhibitors did nothing parallel or otherwise, except to receive without protest that run which the distributors gave them.

Argument.

This petition reiterates for 89 pages* and with numerous lengthy footnotes, the plaintiff's previous attempts, before the Trial Court and the Court of Appeals, to show a non-existent factual basis for the claimed conspiracy, the result of which (if it existed) was to cause plaintiff to show

*Indeed, respondents respectfully suggest that it might well be found that this petition should be denied on the ground of the failure of the petitioner to present its points with accuracy, brevity or clearness within the meaning of paragraph 4 of this Court's Rule 23.

pictures in Salem twenty-eight days after Boston instead of twenty-one days as it wished to do. No actual conflict with the decisions of this Court or of any other Circuit is shown, and no important questions of Federal law not previously adequately dealt with by this Court are raised. Indeed, it affirmatively appears that the Trial Court correctly directed a verdict for the defendants and that the judgment of the Trial Court on that verdict was correctly affirmed.

I. There are no special or important reasons for granting a review on writ of certiorari on this petition.

The Court of Appeals stated in summary of its decision affirming the judgment of the District Court "that placing the plaintiff behind Lynn was plainly commercially justified and that there is nothing else to support an affirmative finding of illegal conspiracy. Consequently plaintiff must be regarded as just another exhibitor commercially disappointed in not receiving better treatment. . . ." (345 F. 2d at 915).

This is just another of the long series of cases in which a subsequent-run exhibitor, disappointed at not receiving the playing position which it desired, seeks damages (on the ground of an alleged conspiracy against the exhibitor in violation of the anti-trust laws) against those distributors of motion pictures with whose distribution practice the exhibitor disagrees.

The principles of law applicable to these cases are well-settled* and have been clearly enunciated by this Court,

*As recently as in the October, 1964, term, this Court reviewed a private motion-picture anti-trust case. *Viking Theatre Corp.* v. *Paramount Film Distributing Corp.*, 378 U.S. 123. But the *Viking* case involved unique issues of law concerning the practice of "splitting product" not involved in this case. See *Viking Theatre Corp.* v. *Paramount Film Distributing Corp.*, 320 F. 2d 285 (3 Cir. 1963).

and this Court has long recognized, and sanctioned, a method of distribution of motion picture films employing runs and clearances.*

United States v. *Paramount Pictures, Inc.*, 334 U.S. 131, 144-145.

Theatre Enterprises, Inc., v. *Paramount Film Distributing Corp.*, 346 U.S. 537.

An examination of the petition reveals that it involves no novel or important questions of law, but merely consists of a voluminous and minutely detailed argument attempting (unsuccessfully, respondents say) to construct a factual basis for its claim of conspiracy and merely reiterating all of its claims, assertions and conclusions which had been rejected by the Courts below.

It has not been the policy of this Court to "grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227. In this connection, in *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508, in dismissing a writ as improvidently granted, this Court said, at 509:

> "The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public

*"A clearance is the period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres.

"Runs are successive exhibitions of a feature in a given area, first-run being the first exhibition in that area, second-run being the next subsequent, and so on. . . ." *United States* v. *Paramount Pictures, supra*, 144-145. In *Paramount* the District Court expressly recognized "the proved utility of clearance practices in the movie industry and also their apparent necessity for a reasonable conduct of the business." *United States* v. *Paramount Pictures, Inc.*, 66 F. Supp. 323, 342.

use—primarily a question of fact. That is not the ground upon which we granted the petition and if sufficiently developed would not have moved us thereto."

And in *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, at p. 178, this Court cited the above cases in saying: "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."

This Court has held that certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of . . . authority between the circuit courts of appeal." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393.

Respondents respectfully submit that there has been no such showing by this petition.

II. THE DECISIONS OF THE COURTS BELOW ARE NOT IN CONFLICT WITH ANY DECISION OF THIS COURT NOR IN CONFLICT WITH ANY DECISION OF ANY OTHER COURT OF APPEALS.

A. The Courts below, notwithstanding plaintiff's unsupported assertions in the petition to the contrary, did consider the evidence as a whole, allowing the plaintiff the benefit of all inferences to which it was entitled under the decisions of this Court, but there was no evidence in the record, direct or circumstantial, from which a jury could find any conspiracy in violation of the anti-trust laws.

The petition makes the assertion *pro forma* (Pet. 3), without any basis therefor, that the Courts below "did not

allow petitioner the benefit of all the evidence, did not allow the petitioner the benefit of all inferences and presumptions to be drawn from the evidence in favor of petitioner in direct conflict with this Court's opinions in *Beacon Theatres Inc.* v. *Westover*, 359 U.S. 500 (1959), *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, and *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473."

But the plaintiff's bare assertion that it was denied permissible inferences from the evidence which would entitle it to go to the jury is not supported by the record. The trial judge granted the defendants' motion for a directed verdict *"on all the evidence"* (emphasis added) because "the plaintiff has failed in this case to prove that the defendants were engaged in any conspiracy . . ." (PR 1571). The Court of Appeals reached its conclusion to affirm the judgment of the Trial Court on the basis (as stated at the outset of its opinion) that "the primary question" was "whether the evidence, including any which we may find the district court wrongfully excluded, entitled, or would have entitled, the plaintiff to go to the jury" (345 F. 2d at 911).

It is uncontested that there was no direct evidence of any conspiracy here (345 F. 2d at 911).

Plaintiff predicates its entire case on the ground that it has established "consciously parallel action" on the part of the defendants plus certain other facts ("plus factors") which plaintiff says entitle it to get to the jury (Pet. 21).

It has been well settled by this Court that " 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." *Theatre Enterprises, Inc.*, v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541.

And the First Circuit (345 F. 2d 910), following its previous decisions in *Brown* v. *Western Massachusetts Thea-*

tres, Inc., 288 F. 2d 302 (1 Cir. 1961), and *Winchester Theatre Co.* v. *Paramount Film Distributing Corp.*, 324 F. 2d 652 (1 Cir. 1963), held that the plaintiff adduced no other meaningful circumstantial evidence.*

Obviously, just any "plus factor" will not enable the plaintiff to go to the jury. The "plus factor" must be probative of a conspiracy. This principle was ably and clearly enunciated by the Third Circuit in *Gold Fuel Service, Inc.*, v. *Esso*, 306 F. 2d 61, 74 (1962), cert. den. 371 U.S. 951 (1963):

> "Recently, in *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 3 Cir. 1961, 297 F. 2d 867, cert. denied, 1962, 369 U.S. 839, 82 S.Ct. 867, 7 L.Ed. 2d 843, we concluded that even consciously parallel action by manufacturers of cigarettes in dealing with a prospective buyer did not supply a sufficient basis for submitting the question of preconcert to the jury, *absent attendant circumstances making it unlikely that these parallel courses of action had resulted from the exercise of independent judgment by each manufacturer.* Here, we think the plaintiff has given no indication that it could show a basis for a logical inference of preconcert predicated on conscious parallelism. This omission is fatal to the plaintiff's case. . . ." (Emphasis added.)

Plaintiff below mainly relied (345 F. 2d at 912) on the unsupported conclusion of its theatre manager, Field, that

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*Whether there was even any meaningful evidence of "conscious parallelism" is open to question here, for the record reveals that the responses of the distributors to plaintiff's self-styled "bid or negotiate letter" varied widely and were inconsistent with any idea that each defendant was acting in reliance on what the others were doing (PR 107, 266-267, 392, 650, 899-901, V6 72).

there was no substantial competition between the theatres in Lynn and the theatres in Salem as constituting a sufficient "plus factor" to entitle it to go to the jury, and, in this petition, still pursues this untenable position (Pet. 23-27). But the record shows, and the Court of Appeals held, that Field "repeatedly testified to specific matters incompatible with" his "conclusory statement" that no substantial competition existed (345 F. 2d at 912). Examples of such inconsistencies noted by the Court of Appeals included Field's admissions that the difference between the twenty-eight days in which his theatre played behind Boston and the twenty-one days of the Lynn theatres was not in itself serious, but drew significance only from the fact that it meant Lynn was playing films a week before Salem (1434-1435; 1535); that Lynn was his "big loss" (PR 1421); that (as summarized by the Court of Appeals—345 F. 2d at 913) "Salem residents, as well as those of Peabody and Marblehead [were] an 'important part' of his patronage" and "'other things being equal' . . . as likely to go to the movies in Lynn as in Salem" (PR 1419, 1432-1433). Field was willing to speculate in his deposition that, if plaintiff played day and date with Lynn, plaintiff's gross "should increase 30 to 50 per cent" which "would probably come out of the Lynn theatre gross. . . ." (PR 1423). Numerous other examples of statements by Field completely contrary to his conclusion as to no substantial competition exist in the record (*e.g.*, PR 1419-1423, 1433; V6 4). On such a record the Court of Appeals felt constrained to state that "we cannot, on the record as a whole, find that Field's favorable testimony made out enough on this issue to warrant a verdict in plaintiff's favor to stand" (345 F. 2d at 913). In the words of the Court of Appeals: "An ultimate conclusion not only unsupported by, but contradictory to the subsidiary facts cannot stand, be it reached by a jury or expressed by a witness. See *Interna-*

tional Paper Co. v. *United States,* 5 Cir. 1955, 227 F. 2d 201, 205, and cases cited therein." Thus it appears, with respect to the "plus factor" principally relied upon by the plaintiff in the Courts below, that no meaningful evidence showing that "factor" exists in the record.

Nor was there any evidence from which it could be inferred that the defendants acted against their best business interests. In this case each defendant distributor's branch manager testified to his belief that his company's economic self-interest required it to play the defendant Lynn theatres ahead of Salem (*supra,* p. 5). None of the witnesses in this case, including Field, even offered to speculate that playing the Salem theatres* day and date with Lynn would result in more film rental for the distributors. Even Field, the plaintiff's manager, recognized that any such increase would be at the expense of Lynn (PR 1423). The plaintiff's theatre was located in the much smaller City of Salem, and, for this reason, its grossing potential was, or so defendants could reasonably believe, much less than that of either of the defendant Lynn theatres. The distributors, believing it to be to their advantage to have two runs in Lynn and Salem, would naturally put the larger situation ahead of the smaller.

The overall gross admission receipts of each of the defendant Lynn theatres greatly exceeded the gross admission receipts of the plaintiff (Pet. 48). The evidence also established, even with respect to almost all of the relatively few pictures as to which plaintiff paid a greater *percentage* of its gross admission receipts as film rental than the defendant Lynn exhibitors (V6 75 ff.), that the Lynn exhibitors paid more *dollars* in film rental than the

*It would have been necessary, as a practical matter, to have moved both Salem theatres up with Lynn together. Moreover, this step would have served as leverage for the theatres behind Salem in seeking an earlier availability.

plaintiff (see *supra*, p. 5; V6 69, 93; Ex 100). Neither (*i*) the evidence of a few isolated pictures (over a more than ten-year period) cited by the plaintiff (*e.g.*, Pet. 29) on which the plaintiff's theatre did pay more film rental nor (*ii*) the plaintiff's evidence of a number of pictures (selected by it) on which the plaintiff, although it paid fewer dollars in film rental, paid a higher percentage of its gross admission receipts in film rental (V6 75 ff.) affects the uncontradicted evidence that, overall, the Lynn theatres were greatly superior in revenue-producing potential (PR 118, 255, 452, 631, 849, 887).* It should be noted that this superiority was greatest in the earlier years of the period, which would have been the years known to the defendants at the time they considered Field's January 31, 1958, request to play on the twenty-one-day availability (Pet. 48).

The evidence on the question of the defendants' best financial interests was correctly summarized by the Court of Appeals when it said:

> "We find plaintiff's contention that placing it behind Lynn was contrary to defendant exhibitors; best

*The difference between the plaintiff's "scale" and the "scales" of the defendant Lynn exhibitors (see Pet. 35) would seem to be irrelevant to the issues in this lawsuit. The "scale," which was first set by the exhibitors in negotiations with each distributor (PR 5 32), and which was described by an officer of the plaintiff in correspondence as "our policy" (V6 42), is not evidence of any discrimination against the plaintiff. The theory of the "scale" was to cause the percentage film rental to be paid in contracts to bear some relationship to the overhead of the theatre (PR 532). Plaintiff made no effort to prove that its "scale" was not fairly fixed in this context or that the "scales" of the Lynn theatres were discriminatorily favorable to them. There was no requirement for the plaintiff to bid in terms of its "scale" with Fox or Paramount Film, and the "scale" was irrelevant for that reason as to the conduct of bidding by those two distributors.

financial interests, independently considered, totally unsubstantiated. That is, it in no way appears how any distributor could have improved its profits simply by putting plaintiff on the same run as the defendant theatres. Nor can plaintiff make anything of the fact that defendants never did any 'experimenting,' in the absence of any showing that defendants had reason to suppose that a change would be financially profitable. It is true defendants never made any surveys of the patterns of patronage in the Lynn-Salem area. Neither did plaintiff. If the status quo was reasonable it did not become unreasonable because defendants failed to experiment to see if something else might also work, or conceivably, might work better."

So it is with all the other "plus factors" mentioned by the plaintiff, all of which were raised below and as to all of which, first the Trial Court, then the Court of Appeals could find nothing probative of any conspiracy on the part of the defendants against the plaintiff in violation of the anti-trust laws.

To the extent that the petition is based on the plaintiff's claim of vertical conspiracies (Pet. 44), it need merely be noted that the plaintiff is required to prove the existence of each separate conspiracy, and, as to each, the fact of damage. Plaintiff did not produce any evidence that any such "vertical" conspiracies existed, and failed even to attempt to adduce any evidence of damage to it resulting from any claimed vertical conspiracy. The failure to show the fact of damage alone would justify a directed verdict for defendants. See *Momand* v. *Universal Film Exchanges, Inc.*, 172 F. 2d 37 (1 Cir. 1948), cert. den. 336 U.S. 967. *Malta Manufacturing Co.* v. *Osten*, 215 F. Supp. 114, and cases cited at page 121 (D. Mich. 1963); see also *Story*

Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562.

Accordingly, it can be seen that this is not a case where the lower Courts departed from the principles enunciated by this Court in the *Beacon, Continental Ore* and *Poller* cases as to inferences to be drawn from the record. For the record, viewed as a whole, does not admit of any inferences which could reasonably be so drawn of conspiratorial action by the defendants. On the contrary, the actions of the defendants were shown to be "plainly *commercially* justified," and not the result of any illegal conspiracy (345 F. 2d at 915—emphasis added).

B. There is no conflict between Circuits.

J.J. Theatres, Inc., v. *Twentieth Century-Fox Film Corp.*, 212 F. 2d 840 (2 Cir. 1954), relied upon by the petitioner to show a conflict between Circuits, is not inconsistent with the decision of the First Circuit in this case.

The *J.J. Theatres* case arose on an instruction by the Trial Court (that case having been submitted to the jury) which in effect told the jury that it could only find for the plaintiff if it found that no substantial competition existed between the theatres involved (both of which were located in the Bronx within about a mile or mile and a half of each other). The challenged instruction had the effect of removing from consideration by the jury the question whether it could find a conspiracy against the plaintiff based on a refusal by the defendants to negotiate with the plaintiff on any terms for the exhibition of pictures on a first neighborhood run.

The facts here are quite different.* Substantial compe-

*Among the other distinctions which can be made between that case and this, it should be noted that the plaintiff in *J.J. Theatres* was subjected to "clearances" in favor of the defendant exhibitors

tition between theatres in Lynn and Salem was established in this case; but the decision to hold Salem in back of Lynn was "commercially justified" based on uncontroverted evidence in favor of Lynn as to the relative revenue producing potential of the two cities.

Nor was there any evidence of any refusal to deal by the defendants as might have been found in the *J.J. Theatres* case. On the contrary, in the instant case it was the plaintiff who (because of its "private arangement") refused to deal with the defendants M.G.M. and Warner Bros.

Moreover, the defendants Paramount Film and Fox offered the plaintiff the right to play on the Lynn availability by bidding for their product, but the plaintiff by its own admission declined seriously to try to obtain product by this method (PR 1223). Since Paramount Film and Fox, along with Columbia (which supplied plaintiff with product on the Lynn availability), were the plaintiff's most important sources of product (PR 1333), it is difficult to see how it could be inferred from the evidence, reasonably or otherwise, that the plaintiff was the victim of a conspiracy to deprive it of the run it desired, even apart from the plain fact that all the evidence was to the effect that it was to the defendants' best business interest to play Lynn first.

C. The evidentiary rulings of the trial judge were clearly correct and should not be reviewed by this Court.

The petition is also predicated in part upon certain evidentiary rulings made by the Trial Court, the bases of

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which could have been found to be unreasonable. In this case there was no "clearance" (or period of time between runs) in favor of Lynn, but merely a "priority of run" which permitted the plaintiff to play immediately after the close of the Lynn run (PR 415-416). (See footnote 3 in the opinion below, 345 F. 2d at 912).

which are summarized in respondents' statement of "Questions Presented" (*supra*, pp. 1-2). These rulings dealt with matters of competency and relevance peculiarly within the province of the trial judge, such as the competency of so-called "experts" and the admissibility of testimony offered through them, and their qualifications, the remoteness (in time) and repetitiousness of certain letters, and other evidence of a speculative nature relating to the subject of damages. In the petition (p. 50) the plaintiff complains that the Court of Appeals "did not discuss" the exclusion of this evidence. In its opinion, however, the Court of Appeals stated: "We have considered all of plaintiff's evidentiary points. No error appears that can affect the basis of this decision" (345 F. 2d 910 at 915). Petitioner seeks by its claims on the evidentiary points to persuade this Court (having failed so to persuade the Court of Appeals) to pass on questions of admissibility of evidence which have been traditionally, and ought in the interests of justice to remain, in the area of the trial judge's discretion.

See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 230-231.

Chateaugay Ore & Iron Co. v. *Blake*, 144 U.S. 476.

United States v. *Johnson*, 285 F. 2d 35 (9 Cir. 1960).

Winthrop Products Corp. v. *Elroth Co., Inc.*, 331 Mass. 83 (1954).

And in any event it is clear that no issue of consequence for this Court is shown with relation to such a subject matter so that the granting of certiorari would be warranted.

Conclusion.

Because the petition discloses no special or important reasons for review by this Court, but involves only questions of law on which this Court has already definitively passed, and because no conflict with any decision of this Court or any Court of Appeals appears in the record, it is respectfully submitted that the petition should be denied.

Respectfully submitted,

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END